



बिहार गजट

असाधारण अंक

बिहार सरकार द्वारा प्रकाशित

6 आश्विन 1937 (श10)

(सं0 पटना 1095) पटना, सोमवार, 28 सितम्बर 2015

निर्वाचन विभाग

अधिसूचना

10 सितम्बर 2015

सं0 डी1-29/2015-22—भारत निर्वाचन आयोग, नई दिल्ली की अधिसूचना सं0-82/बिहार-वि.स./ (1/ 2010)/2015 दिनांक 24.07.2015 एवं निर्वाचन अर्जी सं0-1/2010 में दिये गये माननीय उच्च न्यायालय, पटना द्वारा दिनांक 24.06.2015 को पारित आदेश/न्याय निर्णय को सर्वसाधारण की जानकारी के लिए प्रकाशित की जाती है।

बिहार-राज्यपाल के आदेश से,

सोहन कुमार ठाकुर,

संयुक्त सचिव-सह-

संयुक्त मुख्य निर्वाचन पदाधिकारी, बिहार।

भारत निर्वाचन आयोग

अधिसूचना

निर्वाचन सदन, अशोक रोड, नई दिल्ली-110001 तारीख 24 जुलाई, 2015/2 श्रावण, 1937 (शक)

सं० 82/बिहार-वि.स./ (1/2010)/2015:—लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा-106 के अनुसरण में, निर्वाचन आयोग एतद्वारा निर्वाचन अर्जी सं० 1/2010 में दिये गये उच्च न्यायालय, पटना के तारीख 24 जून, 2015 के आदेश को प्रकाशित करता है।

आदेश से,

आर. के. श्रीवास्तव,

प्रधान सचिव,

भारत निर्वाचन आयोग।

ELECTION COMMISSION OF INDIA

NOTIFICATION

Nirvachan Sadan, Ashoka Road, New Delhi-110001 Dated 24th July, 2015/2 Shravana, 1937 (Saka)

No. 82/BR-LA/(1/2010)/2015:—In pursuance of Section 106 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby published Order dated the 24th June, 2015 of the High Court of Judicature at Patna in Election Petition No. 1 of 2010.

By Order,

R.K. SRIVASTAVA,

Principal Secretary,

Election Commission of India.

IN THE HIGH COURT OF JUDICATURE AT PATNA
Election Petition No.1 of 2010

Bijay Kumar Singh, son of Sri Mohan Singh, resident of village — Nawadah, Silfari, P.O.
— Madhopur, P.S. — Chandra Mandi, District — Jamui.

..... Petitioner

Versus

Sumit Kumar Singh, son of Sri Narendra Singh, resident of village and P.O. — Pakari, P.S.
— Khaira, District — Jamui.

.... Respondent

Appearance :

For the Petitioner : Mr. S.B.K.Mangalam, Advocate

For the Respondent : Mr. Prabhat Kumar Verma, Sr. Advocate

CORAM: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH C.A.V.
JUDGMENT

Date: 24-06-2015

By this Election Petition, the election petitioner Sri Bijay Kumar Singh has challenged the election of Sri Sumit Kumar Singh, the sole-respondent who has been declared elected as a member of 15th Bihar Legislative Assembly from 243, Chakai General Assembly Constituency in the district of Jamui for which elections were held on 01.11.2010.

2. At elections, after scrutiny, 12 candidates were found validly nominated to contest the elections .which list was published by the Returning Officer on 18.10.2010. The elections were held on 01.11.2010 at 286 Booths. On 24.11.2010, counting was done and result declared. The election petitioner who was the official candidate of Lok Jan Shakti Party secured 21,618 votes and came second. The sole contesting respondent Sri Sumit Kumar Singh who was the official candidate of Jharkhand Mukti Morcha secured 21,806 votes, and was accordingly declared the winner by a margin of only 188 votes. The third was Sri Falguni Prasad Yadav the official candidate of Bhartiya Janta Party who secured 20,259 votes, the difference being 1,547 votes from the winning candidate. The rest of candidates including the Congress candidate could not cross four figures total.

3. As would be seen from the above, the winning margin was a narrow 188 votes giving cause to the election petitioner to raise all pleas that could be available to impeach the elections, but fortunately, there has been no allegation leveled with regard to any corrupt practices. At the very outset, it may be noticed that as the returned candidate i.e. the sole-respondent Sri Sumit Kumar Singh happened. to be the son of a sitting minister of the coalition government of Janta Dal United and Bhartiya Janta Party, a feeble suggestion was made by the election petitioner that the official involved in the elections were more favourably disposed to the returned candidate. Rightly this was not pursued by the election petitioner seriously in any respect.

4. The election petition was filed on 07.12.2010. By order dated 20.01.2011 notices were directed to be issued to the sole contesting respondent through two processes firstly directly to the contesting respondent and then court made a request to the Secretary of Bihar Legislative Assembly to serve a copy of the election petition on the sole respondent as he had been elected a Member of the Legislative Assembly, but regrettably the Secretary of the Legislative Assembly returned the same without service pointing out to the court that the Secretary of the Legislative Assembly could not be made to act as an agent of the court nor

was its job to serve notice on its members forgetting that this court had only requested the cooperation to expedite the matter of appearance. Ultimately when all other modes to serve notice on the elected Member could not fructify, by order dated 25.03.2011, court directed to publish notices for substituted service through newspapers and it is only thereafter that the sole respondent appeared through Sri Prabhat Kumar Verma, learned Senior Counsel. Upon written statement being filed learned issues counsels agreed and eight issues were framed by order dated 15.07.2011 which are as under: -

- (i) *Whether the election petition itself is liable to be dismissed in view of Section 86 of the Representation of People Act, 1951 inasmuch as two copies of the election petition have not been submitted along with the election petition and served to the respondent as required under Section 81 of the said Act ?*
- (ii) *Whether election petition is liable to be dismissed for not setting forth full particulars supported by verification under the forms (statutorily prescribed in relation to allegation) with respect to allegation of corrupt practices even though there is no such issue?*
- (iii) *Whether the election petition discloses any cause of action and, in absence thereof, is liable to be dismissed in view of Section .83 read with Section 87 and/or Order VI Rule 16 or Order VII Rule 11 of the Code of Civil Procedure?*
- (iv) *Whether there was absence of Polling Officials or Polling Officers at Booth Nos. 99, 100, 135 & 196 in the constituency concerned at the relevant time deprived voters of their right to vote and, thus, materially affected the election and results of election, especially when the winning margin was only about 188 votes?*
- (v) *Whether recovery of Electronic Voting Machines of booth Nos. 62, 63, 64 & 65 from a private unauthorized premises is material fact of irregularity affecting the election?*
- (vi) *Whether the counting of votes in respect of Booth No. 33 was legal or not in accordance with law. If it was not in accordance with law still that materially affect the result of election of the sole-respondent?*
- (vii) *Whether there has irregularities committed during counting of votes which has materially affected the result of election?*
- (viii) *Whether the election petition is not maintainable in absence of necessary parties. In other words, it must fail for non joinder of parties?*

5. Due to typographical mistake in regards issue no. (iv) instead of booth No. 136 booth No. 196 was typed and later ordered to be corrected. Out of the issues so framed issue no. 1, 2, 3 & 8 are at the instance of the contesting respondent in aid of dismissal of the election petition, whereas, issue nos. 4, 5, 6 & 7 are material for election petitioner's case and setting aside the election.

6. First, I would like to deal with issue no. 5 with regard to alleged recovery of electronic voting machines of booth nos. 62 to 65 from a private unauthorized premises. On behalf of election petitioner, initially, various evidences were led, both documentary and oral, to show how, when the EVMs were being transported after voting, to the election centres at Jamui, the Polling Officers of the said booths had deviated from the route and

were found in a private residence with the EVMs. It was sought to be argued that having been recovered from unauthorized premises after the polls, but, before collection of EVMs and counting thereof, it should be taken a material irregularity affecting the elections and the votes polled should either be discarded or fresh polling be ordered. But when confronted with the proceedings of the review meeting Ext. R/3, Ext. R/3/1 & Ext. R/3/2, where note was taken of these four EVMs and that there had been no complaints or protests at that time by the election petitioner. Sri S.B.K. Mangalam, learned counsel for the election petitioner, conceded that he would not seek court's finding on this issue and, as such, would not press the issue for adjudication.

7. In fairness to Sri Mangalam, it must be noted that the Polling Officers had given an explanation that they had been travelling in an open tractor trolley and it had been drizzling and, as such, when they reached Jamui, near the election centre, there being a long line of vehicles waiting to deposit the EVMs, they got down from the tractor trailer and went to one of the polling officer's residence nearby to dry and change. The district authorities found them there, but upon close scrutiny of the EVMs, they were not found tampered in any manner. It is because of this reason that the election petitioner did not raise any grievance at the review meeting or after the counting of votes in this regards.

8. In view of the aforesaid, this court does not decide the said issue which is dismissed as not pressed.

9. Regarding issue no. 1 as raised by the sole contesting respondent, it may be noticed that the grievance of the respondent is that the copies of the election petition as served did bear the signature or attestation of the election petitioner and, as such, in terms of Section 81(3) of the Representation of People Act, 1951, the election petition should be dismissed in terms of Section 86 thereof.

10. Suffice to say that the election petition is not defective in any manner. It has the signature in original of the election petitioner and is duly verified and annexures attested, but it appears that copies that are meant to be served on the contesting respondent being singular in the present case, they were true photocopies of the election petition itself. If any, it is a hyper-technicality and a mere irregularity. It would not vitiate the proceedings leading to dismissal of the election petition itself. The issue is thus decided against the respondent and in favour of the election petitioner.

11. With regard to issue no. 2 that the election petition should be dismissed as it does not set forth full particulars supported by verification in respect of allegation of corrupt practices. Again suffice to say as noticed in the issue itself, the election petitioner is not made corrupt practice as a ground for invalidating the election of the returned candidate i.e. sole contesting respondent. Thus, if there is no such issue of corrupt practice being raised for adjudication and/or decision, the mandatory requirement of setting forth particulars supported by verification in this regard is not required and the election petition cannot be dismissed on this ground. It would have been a totally different matter if making an issue of corrupt practice, the pleadings are not in accordance with the mandatory provisions in this regards. In such an event, there being no pleadings of which cognizance could be taken by the court in relation to corrupt practice the election petition could have been dismissed but that is not the case. Accordingly, this issue is decided in favour of the election petitioner as against the contesting respondent.

12. Regarding issue no. 3 that the election petition does not disclose any cause of action and in absence thereof in view of Section 83 read with Section 87 of the Act as also Order VI Rule 16 or Order VII Rule 9 of Code of Civil Procedure, the election petition ought to be dismissed. This issue has been raised by the respondent to scuttle the proceedings. Having gone through the election petition, there is sufficient pleadings and

material facts to give cause of action to election petitioner to pursue the matter. This is not the stage where the evidence has to be seen, because, it is well established that it is only material facts that have to be stated and not all evidence in support thereof in the election petition. Facts in this regard to sudden change of polling booths without intimation, non-arrival of polling staff in polling booth in time, recovery of EVMs from unauthorized premises have been clearly pleaded. It is another matter whether it can be substantiated by evidence, but that is a matter of trial and not of pleading. This court finds that there are sufficient facts which are material . facts which have' been pleaded and on that count the election petition cannot be dismissed summarily without going through the evidence which is brought on record in course of trial. The issue is, thus, decided against the respondent and in favour of the election petitioner.

13. Issue no. 8 is with regard to absence of necessary parties. In fairness to Sri Prabhat Kumar Verma, learned Senior Counsel for the respondent, he could not show as to which necessary party was omitted to be made a party to the election petition as it was the election of the returned candidate that was challenged. It was not challenged on the ground of corrupt practices. The official witnesses cannot be said to be necessary parties muchless witnesses who had conducted the election process. Necessary parties are those in whose absence the election petition itself becomes not maintainable. Section 82 of the Act provides for the parties who shall be joined as respondent to the election petition. This court finds nothing in the aforesaid provision which obliged the election petitioner to make anyone else as a party to the election petition in view of relief sought for and, thus, this issue also decided against the respondent and in favour of the election petitioner.

14. That leaves us with issue nos. 4, 6 and 7. Regarding issue nos. 6 & 7, they are inter-connected in the sense it relates to the EVM appertaining to booth no. 33 and what happened at the time of counting of votes on 24.11.2010.

15. The election petitioner has pleaded in the election petition that when the EVM of booth no. 33 was brought on the counting table it was found that one of the paper seals was tampered, when the EVM cover was opened it was found that the EVM machine was on and had not been switched off and the battery had exhausted and the machine was not in a position to display the votes (paragraph 36 of the election petition). The Returning Officer then sent for mechanic of the company who came with technical support. He operated the machine to give the readings (paragraph nos. 39 & 40 of the election petition). The recording showed only three votes in favour of petitioner, whereas 394 votes were shown in favour of the contesting respondent. The margin of votes of the victim being 188 votes. This was a material irregularity in counting of votes. This machine ought not to have been taken into account.

16. On behalf of the sole contesting respondent, it is submitted that there is no pleading of any specific irregularity which could vitiate the counting in respect of this booth. It is submitted that the election petitioner is only trying to draw adverse inference which is not sufficient.

17. Sri Subir Rajan, Returning Officer for the elections has been examined as RW ,14 (OW 14). In his deposition, he has admitted that when the EVM was brought for counting it did not display the votes. He admits that he had called the technician to connect the EVM with another device, and then it reflected the number of votes. He was questioned as to what was the device he replied that he was not knowing not being a technical man.

18. If we see the pleading in the election petition, the evidence of Returning Officer who is also the Presiding Officer, it would be abundantly clear that everyone was aware that by mistake the EVM was left on while sealing the same. The internal seal of the EVM was not found tampered. It is only some paper seal of the cover of the EVM that was alleged to

be tampered. If the machine is left on, then taking into consideration the fact that the voting was done on 01.11.2010 and counting was done on 24.11.2010, there cannot be any doubt that the battery would have drained out. This is admitted in the election petition itself. All that the technician did upon being called, was he connected the EVM to a fresh battery pack and accordingly read the result contained therein. How can this be termed as any material irregularity in counting affecting the polls? What is the material irregularity is neither pleaded nor proved. It may further be noted that there was no written complaint made or protest registered immediately at the time of counting by the election petitioner in this regards.

19. In view of the aforesaid facts, it has to be held that it does not stand established that the counting of votes in respect of booth no. 33 was wrong, illegal or not in accordance with law and the votes polled in said booth cannot be discarded for any reason. The issue is thus decided against the election petitioner and in favour of the respondent. These two issues are decided accordingly.

20. That leaves us with issue no. 4, in relation to which, there has been substantial contest. Both the parties have agreed that issue no. 4 as originally framed needs to be reframed for clarity. With consent of the parties, the issue was reframed to bring out the real dispute in question for adjudication as under :

"Whether the results of election in respect of polling booth nos. 96, 97, 100 and 136 were materially effected vitiating the election results because of the change of polling booth denying the right Of voters to cast their votes."

21. Election petitioner's submission is that number of voters who were covered by the aforesaid four booths were about 4500 and the winning margin was only 188. Because of the sudden last minute change in the location of booths which was contrary to the mandatory instructions of the Election Commission of India, the voters were caught unaware and there was nil voting. Had there been free and fair elections~ and voters permitted to cast their votes, as they were entitled to, the results would have material changed.

22. Sri Verma, learned Senior Counsel for the contesting respondent submitted that it was factually wrong to state and it was not supported by evidence that the booths were changed without notice to anybody. To the contrary, booths were changed in consultation with the candidates and with full knowledge of the candidates and it had the approval of the Election Commission of India. Nil voting was because of the booths being hyper sensitive and there was serious threat from the extremist. He further submitted that merely because there was nil voting no inference can be drawn, as to how the votes could have been polled, if they were polled. There is no evidence on record to show that the voting would have gone in favour of the election petitioner. It is established that votes are scattered and there is no material to predict or show as to how many people would have voted and in what manner they would have voted.

23. In order to appreciate the contention on behalf the election petitioner, it would be first necessary to refer to certain provisions of the Handbook of Returning Officer as issued by the Election Commission of India (hereinafter referred to as "Commission"). This contains the entire guideline as laid down by the Commission with regard to conduct of election which virtually covered every aspect of the entire process and lays down the procedures to be followed.

24. Chapter 2 of the handbook deals with polling station and has reference to Section 25 of the Representation of People Act, 1951 (hereinafter referred to as the "Act"). Clause 1 of this chapter clearly inter alia provides that once the list of polling stations are published by the approval of the Commission and the same is proposed to be adopted, no fresh

approval of the Commission is necessary and if any modification are proposed, the Commission's approval be obtained well in advance at least two weeks before the last date for the withdrawal of candidature. It is not in dispute that the list of polling booths was duly published on 15.10.2010, whereas last date for withdrawal of candidature was 18.10.2010.

25. The next relevant part of the handbook is Clause 7.1 of this chapter which provides that once the list of polling stations is duly notified that would be the list of polling stations for that Constituency. Clause 7.2 thereafter provides that District Election Officer can correct only printing or clerical mistakes, if any, after such publication. Clause 9 deals with modification in the list. The important Clauses would be Clauses 9.3, 9.4 and 9.5 which are quoted hereunder:

- 9.3 *Once the lists are approved, requests from political parties and individuals for shifting of the polling stations from one village to Another or from one site to another should be considered, only in extremely exceptional cases where there are overriding considerations of public convenience for the change proposed. If the district Election Officer/Returning Officer is satisfied, he should consult other political parties and contesting candidates and then only make his recommendations to the Commission in the matter.*
- 9.4 *District Election Officer should, on no account, make any change in the location of polling stations already approved by the Commission, without its prior approval, as any change may ultimately result in the election being declared void.*
- 9.5 *Where changes become inevitable and have to be made, such changes should be referred to the Commission for its previous approval. The changes should be fully publicized and all contesting candidates and political parties, etc., informed in writing.*

26. These provisions must be read with Section 62 of the Representation of People Act, 1951 which gives a statutory right to vote to every voters who is in the voters list. It is as a consequence of this right which is exercised by the voters in a free and fair manner that the true election results are to be declared.

27. From the reading of the aforesaid provisions as made in the Handbook by the Commission, it is apparent that what is contemplated is that the list of polling stations must be finalized at least two weeks before the last date of withdrawal, thereafter, only printing and clerical mistakes can be corrected. If there is an urgent need of modification, then it can only be done with the prior approval of the Commission and due intimation has to be given to the persons concerned.

28. Now, let us examine the evidence which is documentary and oral in regards this issue.

29. First, the documentary evidence —the 15th Bihar Legislative Assembly Elections having been announced, it appears that a wireless message was sent on 02.10.2010 by the District Election Officer cum Collector, Jamui, to various Assistant Election Officers and others seeking views with regard to change or re-location of polling station. This has been referred to in the reports which were filed thereafter which are Exhibits — R7 and R7/1, both being dated 04.10.2010, the letters from Chakai Sub-division and Sono Sub-division to the District Election Officer. In the said two documents, there were recommendations for shifting certain booths including booth no. 92, 96, 97, 99, 100, 115, 132 and 136 and the reasons for this was that these booths were located in extremists affected areas within dense forest where election personnel's safety would be compromised. Then we have Exhibit — 26, the letter dated 13.10.2010 of the Superintendent of Police,

Jamui, to the Collection, Jamui, who happens to be the D.E.O. as well, giving the list of booths which required to be changed in view of the difficulty of the election personnels in extremist areas. The booths as recommended earlier for change are also included in this list. We then have the list of booths for the Constituency as was finally published on 15.10.2010. 18.10.2010 was the last date for withdrawal of the candidature with date of poll on 01.11.2010. It appears that thereafter the District Election Officer cum Collector, Jamui, called a meeting on 21.10.2010 of all the candidates of political parties for discussion with regard to change of location of some polling booths. The election petitioner undisputedly attended the said meeting as well. This would be evident from Exhibit — R8/1 and R 8. This also incorporates the decision taken in the said meeting which is then recorded on 22.10.2010. On 22.10.2010, the District Election Officer vide Exhibit - R9 which is the same as Exhibit — 15, makes his recommendation to the Chief Election Officer, Bihar with regard to changes of booths. This was then immediately published as reports in the local Newspapers which is Exhibit — O & P. The next document is letter dated 26.10.2010 of the Election Commission of India (Exhibit — R 23) to the Chief Election Officer, Bihar, according approval to the proposed changes in the location of the polling booths and this letter is dated 27.10.2010 forwarded to the District Election Officer, Jamui, by Chief Electoral Officer, Bihar. We then have Exhibit — 32, the press notification in newspapers dated 30.10.2010, notifying the change of 10 locations of booths in respect of Chakai Constituency.

30. Thus, from the aforesaid sequence of documentary evidence brought on record, it would be seen that though various objections called for by the District Election Officer on 02.10.2010 with regard to change of polling booths and responses were received on 04.10.2010. Where after on 15.10.2010, the final publication of polling booths was made which was three days prior to the last date of withdrawal of nomination which was 18.10.2010. Yet, on 21.10.2010, a fresh meeting was called for and decisions taken therein to shift certain booths in which not only election petitioner but his local party president was also present apart from other candidates .and political parties. This decision taken was on 22.10.2010 sent to the State Election Officer for approval. The approval from the Election Commission, of India received on 26.10.2010 and transmitted to Jamui on 27.10.2010. This were also published in the Newspapers on 22.10.2010 and subsequently the official communication was also issued on 30.10.2010. Accordingly, voting was held on 01.11.2010, where as noted above, in about five booths there were no voting at all. The election petitioner contends that this was primarily because of sudden change of location of polling stations without information to the voters. But, the stand of the respondent is that the change was known to everybody, but, because of the disturbed areas' and extremist warnings people did not vote. Thus, there is no cause for re-polling on these booths.

31. **Second, the oral evidence** - Now, when we come to oral evidence. One has to keep in mind that we are dealing with a election dispute. The parties and witnesses are committed voters having allegiance to one or the other political party, therefore, it is not safe to blindly rely upon the said evidence, because, it is likely to be prejudiced. Both the sides have brought in evidence who are voters in respect of the said booths. Election petitioner's witnesses state that they had no information about change of booth when they went to the booth they found no one there, they waited and returned. On the next .date they came to know that the location of booth had changed.. Authorities did not take any step to publicize the change of location in the locality which are to be affected. On the other hand, the witnesses on behalf of sole respondent being equally committed voters have said that When they, went to vote on the new polling stations they found large number of people

waiting there but out of fear of extremist they could not gather courage to vote. Had it been peaceful time they would have voted.

32. The oral evidence that is available on this issue may now be noted. First, the District Election Officer-cum-District Magistrate, Jamui, Sri Bipin Kumar, who was examined as RW-17, has clearly stated that he had received a recommendation for change of location of about ten booths in relation to this election and at his instance meeting of all political parties was called for on 21.10.2010, and the proceedings were recorded as Ext. R/8. He then sent the recommendation by his letter dated 22.10.2010 to the State Election Officer as Ext. R/9 which was duly approved by the Election Commission of India. He received the approval on 27.10.2010, which changes were then notified in the Newspapers. In the cross-examination, he admitted that he was aware of the instructions contained in the handbook issued in regard to change of location of polling booth as prescribed by the Election Commission of India.

33. Election petitioner examined seven witnesses on this issue. They are voters of booth nos. 96 and 99 only and the election petitioner himself. P.W.1, namely, Md. Nazam Ansari, being voter of booth no. 96, has deposed that he went to the polling station did not find any arrangement there. There were large number of voters who were there, he returned, and on the next day, he came to know that the booth had been changed denying him right to vote. If he had known the new location earlier he would have gone and cast his vote. Similar is the evidence of P.W.2, P.W.3, P.W.4, P.W.5 and P.W.6. P.W.4 admits in cross-examination that their area was Naxal affected area. P.W.7 is the election petitioner himself. On this issue, he admits that at booth no. 97 only eleven votes were cast, but, he asserted that it was not by the voters but by the polling staff themselves. He does not disclose as to how he got this information. He states that in the six polling booths, in respect of this issue, there were 4472 voters who were his supporters and they had been deprived of right of voting because of the change of location of booth. In his cross-examination, he states that the change of location of booths, as made by the District Administration, was not informed to him nor was it communicated to the people of the locality concerned. He has stated that he had visited booth nos. 96, 97, 99, 100 several times including the date of election.

34. Now, we come to the evidence on behalf of sole contesting respondent. Twelve witnesses have been examined on behalf of the respondent, who were voters of different booths under consideration. They have admitted that though there was no official communication about change of location of booths they were aware of the change but because of Maoist/Naxal threat, though they had gone to the new booth they did not cast their vote out of fear. They have admitted that if the elections were conducted in a peaceful atmosphere they would have voted.

35. I may note that RW-7, namely, Md. Abbas Ansari, who was voter in respect of booth no. 136, has categorically stated that his villages are highly affected by Maoist activities and the villages are not connected by motorable road. He has been Mukhiya of the Gram Panchayat since 2006, and if, the elections were held in a fearless atmosphere he would have voted. He states that polling staff was there but none of the villagers cast their vote and they returned.

36. Sri S.B.K. Mangalam in support of the election petitioner submits elaborating his points that the directions issued by the Commission in the shape of the Handbook laying down procedures are mandatorily to be complied with. They are to ensure free and fair elections and infraction thereof must lead to invalidity of polling/voting calling for re-poll. His submission, thereafter, would be that the mandatory guidelines as contained in the handbook, relevant parts whereof quoted above, clearly contemplates that changes or modification in the locations of polling booths should be made two weeks before the last

date of withdrawal of candidature and that too with prior approval of the Commission. He has referred extensively to the case of **Mohinder Singh Gill and Anr. Vs. Chief Election Commissioner** since reported in **AIR 1978 SC 851 = 1978 (1) SCC 504**; to show that directions are mandatory and binding on the authorities and have to be scrupulously followed.

37. With reference to documentary evidence he would plead that before finalizing the polling stations, the District Election officer cum District Magistrate cum Collector, Jamui, itself sent out wireless message on 02.10.2010 to the authorities seeking their views in the matter. Responses were received from Chakai Sub-Division and Sono Sub-Division Ext. R/7 and Ext. R 7/1 being dated 04.10.2010 as also from the Superintendent of Police, Jamui (Exhibit – 26 dated 13.10.2010). But, on 15.10.2010, the final list of booths was published without incorporating those changes. This was three days before the last date for withdrawal of candidature. Once, the final list of candidates was published then on 21.10.2010, after final publication of list, as noted above, a meeting was called and then on 22.10.2010, recommendations were made for change of location of booths which was ultimately approved by the Commission on 26.10.2010. The official Newspaper publication whereof was made on 30.10.2010 whereas elections were to be held on 01.11.2010. This was in complete breach of provisions of the Handbook. That apart, with reference to the recommendations that were received by the District Election Officer, he would argue that the consideration for change was not for the benefit of the voters but only for the protection of the electoral officers on duty. He would argue that if it was not safe for the electoral officer to reach the villages then how can it be assumed that it was safe for the villagers to leave their village and their original booths and travel to another village miles away to cast their vote. This consideration for change was bad. Then the changes were affected too late in the day and no official visited the village to inform about the changes. He, thus, would submit that the polling on the aforesaid changed booths which recorded nil voting with exception of 11 votes in booth no. 97 require re-polling. This exercise was designed to prejudice the election petitioner who had large support in those areas. This takes greater importance when the winning margin was only 188 of the total number of voters in this changed booth involved were about 4500. According to him, this did not reflect the true Will of the voters.

38. On the other hand, Sri P.K. Verma, learned senior counsel appearing for the returned candidate being sole respondent submitted that the documentary evidence would clearly show that not only the election petitioner participate in the meeting dated 21.10.2010 which considered the change of location of booths but he never protested. He was fully aware of the changes. The changes were reported by the press immediately after the meeting. Approval of the Commission having been received, it was also officially notified in the press, thus, it was for the election petitioner to ensure that his voters were accordingly informed and there was time enough. The true reason for nil voting was not shifting of booths but of fear of extremist who had called for boycott of elections and threatened voters.

39. In the beginning, I would refer to the judgment of the Apex Court in the case of **Thakur Sen Negi Vs. Dev Raj Negi** since reported in **AIR 1994 SC 2526** wherein in paragraph – 3 this is what their Lordships have said which read as such:

“It must be remembered that in an election dispute, the evidence is ordinarily of partisan witnesses and rarely of independent witnesses and, therefore, the court must be slow in accepting oral evidence unless it is corroborated by reliable and dependable material. It must be remembered that the decision of the ballot must not be lightly interfered with at the behest of a defeated candidate unless the

challenge is on substantial ground supported by responsible and dependable evidence."

40. Then, I must noted that Section 100 of the Representation of People Act, 1951 is complete in itself with regard to grounds of challenge. Section 100(1) provides ground on which the election of returned candidate can be held to be void, nothing can be inferred nor anything can be omitted. If we refer to the aforesaid so far as the facts of the present case is concerned, the case could only come under Section 100(1)(d) of the Act. But, before invoking the same, it must be shown that the results of the election has been materially affected as has been held in the case of **Chhedi Ram Vs. Jhilmit Ram** since reported in **AIR 1984 SC 146**; that it is by facts that has to be shown, in fact, if elections were held, the results would be materially different. A mere probability would be speculative and not a reliable test. This is relevant because what is said by election petitioner is that if the voting had taken place he would have secured more votes on those booths where there was nil voting but because of sudden change of location.

41. We must keep in mind that out of the entire electorate, it is not that everybody would vote. Then even, if they vote, at the time of casting their vote, there are different considerations. There is no hard and fast rule as to who would vote for whom. The votes get scattered and who would get how many votes is then purely speculative. In this connection, I may also refer to recent judgment of the Apex Court in the case of **Kalyan Kumar Gogoi Vs. Ashutosh Agnihotri and Anr.** since reported in **(2011) 2 SCC 532**; wherein it was alleged that about 200 to 300 voters could not cast their vote because of shifting of the polling booth and thus materially affected the election. This was negative as there was no proof of facts as to how it materially affected the elections. The Apex Court upheld the decision of the High Court dismissing the petition challenging the election.

42. I may then refer to another recent decision of the Apex Court in the case of **Mangani Lal Mandal Vs. Bishun Deo Bhandari** since reported in **(2012) 3 SCC 314**; wherein the Apex Court in paragraph 11 of the reports clearly was of the opinion that merely because there was non-observance of statutory rules election could not be set aside unless it is shown that such non-observance resulted in materially affecting the results. It is not only to be pleaded, but proved.

43. Keeping these principles in mind, I would now examine the evidence. First, so far as the statutory procedure is concerned, no doubt, it is binding, but in exigency of situation change in polling booth with approval of Election Commission of India even after the last date of withdrawal of candidature cannot be said to be an infraction of law or procedure necessitating intervention by courts in an election petition.

44. The documentary evidence, as noted above, it clearly shows that the election petitioner was fully aware of the changes that were being made and he had participated in the meeting and had raised no objection regarding the changes. He and his party were fully aware of the changes and if his voter base was getting affected, it was expected to him to take effective steps to secure his interest by informing his voters. Reports were there in the Newspapers well in time, then to say that location of booths were suddenly changed and the voters were caught unaware is not of much consequence.

45. In the facts aforesaid, the ocular evidence, as noted above, is partisan. There is clear evidence that there were Maoist threat. Whether it was because of change of location or Maoist threat that votes were not cast is again speculative and in absence of any concrete fact proved no concrete opinion can be formed. But the fact remains that people did not vote for various reasons. If people did not vote, the administration cannot be blamed nor can the returned candidate be blamed. As noted, as per the decision of the Apex Court above, the

result are not to be lightly interfered with, unless cogent evidence is brought on record to show otherwise. In the present case, the evidence is surely discrepant.

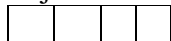
46. In the result, upon the facts as noted above, this Court is unable to come to a finding that the results of election by virtue of change of location of booth materially affected the results in order to avoid the elections in respect of the booths aforesaid. Thus, this issue is decided against the election petitioner and in favour of the respondent.

47. Before closing, I would only observe that all the recommendations for change of location of booth are based upon the safety and security of electoral officers. It cannot be disputed that they are integral part of the process, but at the same time, the Election Commission of India and the officers associated with election should consider that this is an election where right of voters is the first consideration. In the present case, in an extremist disturbed area asking the voters to leave their villages and travel through extremist affected territories, where the officers dread to travel, to another village to cast their vote would be unreasonable. In none of the communications, this aspect of the matter is taken into account. It is hoped that this aspect be kept in mind by the Election Commission of India in future before according approval for change of location of booth and that to so close to the voting day.

48. In view of the issues as decided above, the election petition must fail and is dismissed, accordingly.

(Navaniti Prasad Singh, J.)

Rajeev/A.F.R.



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